on the basis of the facts reflected in the jury verdict or admitted by the defendant," this should be the guiding language in determining if there was a waiver of the right to appeal a sentence imposed in violation of *Booker*.

Moreover, the language of the appeal waiver in the case at bar is even more ambiguous then that discussed by Judge Moore. Here, the waiver allows the defendant to appeal a "punishment imposed in excess of a statutory maximum." By contrast the language discussed in *Luebbett* and other cases refers to a sentence in excess of "the statutory maximum." The language here makes clear that the parties intend that there is more than one statutory maximum. There is the statutory maximum for *Booker* purposes and the statutory maximum under the applicable statute. Petitioner is allowed to appeal a sentence in excess of either statutory maximum.

It is a violation of due process under the U. S. Constitution, Fifth Amendment, to prohibit an appeal when the defendant has a statutory right to appeal. *See*, *Halbert v. Michigan*, 125 S.Ct. 2582 (2005); 18 U.S.C. §3742. When the right to an appeal is provided the right should not be infringed by unconstitutional or unreasonable restrictions. Not allowing an appeal in the situation present here is just that sort of unreasonable restriction that should not be allowed.

CONCLUSION

Based on the foregoing, Petitioner prays that this Court grant this Petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 03-11196

[Filed September 27, 2005]

UNITED STATES OF AMERICA, Plaintiff-Appellee;	)
v.	)
ROY L BROWN, Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:03-CR-164-ALL-N

ON PETITION FOR REHEARING

Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges. PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in5TH CIR. R. 47.5.4.

Roy L. Brown petitions for panel rehearing in light of the holding in United States v. Booker, 125 S. Ct. 738 (2005), that Blakely v. Washington, 124 S. Ct. 2531 (2004), is applicable to the Federal Sentencing Guidelines. We now GRANT the petition for rehearing, withdraw our earlier opinion, and substitute the following. See FED. R. APP. P. 40(a)(4)(c).

Brown appeals following his guilty plea to securities fraud, in violation of 15 U.S.C. §§ 77q(a) and 77x, and bank fraud, in violation of 18 U.S.C. § 1344. Brown pleaded guilty pursuant to a written plea agreement that contained a waiver of the right to appeal. We may examine Brown's plea agreement sua sponte to determine whether we may hear his claims. United States v. Martinez, 263 F.3d 436, 438 (5th Cir. 2001). We conclude that the appeal is barred by the plain language of Brown's knowing and voluntary appeal waiver in the plea agreement. See United States v. Bond, __ F.3d __, No. 04-41125, 2005 WL 1459641, at *3-4 (5th Cir. June 21, 2005); United States v. McKinney, 406 F.3d 744, 746-47 (5th Cir. 2005).

PETITION FOR REHEARING GRANTED; APPEAL DISMISSED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 03-11196

[Filed November 4, 2005]

UNITED STATES OF AMERICA, Plaintiff-Appellee;	)
v.	)
ROY L BROWN, Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:03-CR-164-ALL-N

ON PETITION FOR REHEARING

Before KING, Chief Judge, and DeMOSS and CLEMENT, Circuit Judges.

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Carolyn King
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-5598

[Filed June 1, 2005]

UNITED STATES OF AMERICA, Plaintiff-Appellee;	)
v.	)
FREDERICK BEN LUEBBERT, Defendant-Appellant.	)

DISSENT

MOORE, Circuit Judge, dissenting.

Because I believe that Luebbert's plea agreement does not unambiguously waive Luebbert's right to raise a Sixth Amendment challenge to his sentence on the basis of *United States v. Booker*, 160 L. Ed. 2d 621, 125 S. Ct. 738 (2005), I respectfully dissent.

Luebbert's plea agreement explicitly provides that Luebbert has not waived his right to appeal "any sentence imposed in excess of the statutory maximum." Joint Appendix

at 12. The scope of this reservation of appellate rights is ambiguous, however, because the plea agreement does not explain when a sentence will be deemed to be "in excess of the statutory maximum." While I agree with the majority that it is reasonable to interpret the "statutory maximum" exception as "referring to the upward limit of the statute charged in the indictment to which the defendant pled guilty," Maj. Op. at 2, I disagree with the majority that this is the *only* reasonable interpretation of the "statutory maximum" exception.

In *Booker* and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), the Supreme Court explained that when a sentence rests on judge-found facts rather than facts found by a jury or admitted by the defendant, the sentence exceeds the relevant "statutory maximum." *See Booker*, 125 S. Ct. at 749 ("Our precedents . . . make clear 'that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*.'") (quoting *Blakely*, 124 S. Ct. at 2537). Thus, when a defendant raises a *Booker*-based Sixth Amendment challenge to his or her sentence based on judicial fact-finding, the defendant can be understood to be claiming that his or her sentence is "in excess of the statutory maximum."

Unlike the majority, I believe that it is more appropriate to treat the statutory-maximum exception as ambiguous rather than to speculate about the parties' intended meaning. *See Smith v. Stegall*, 385 F.3d 993, 999 (6th Cir. 2004) ("One fundamental principle of contract interpretation is that primary importance should be placed upon the words of the contract. Unless expressed in some way in the writing, the actual intent of the parties is ineffective, except when it can be made the basis for reformation of the writing.") (internal quotation

marks and citation omitted). Because "ambiguities in a plea agreement must be construed against the government," *United States v. Fitch*, 282 F.3d 364, 367-68 (6th Cir. 2002); *see United States v. Johnson*, 979 F.2d 396, 399-400 (6th Cir. 1992) ("Both constitutional and supervisory concerns require holding the government to a greater degree of responsibility than the defendant . . . for imprecisions or ambiguities in the plea agreements.") (internal quotation marks and citation omitted), the statutory-maximum exception in Luebbert's plea agreement should be construed as permitting Luebbert to appeal his sentence on *Booker* grounds. *See United States v. Cortez*, 120 Fed. Appx. 535 (5th Cir. 2005) ("The waiver in Cortez's plea agreement contained an exception for sentences imposed above the statutory maximum. Thus, out of an abundance of caution and because appellate-waiver provisions are to be construed against the Government, the court will consider Cortez's *Blakely* argument.") (citation omitted); *see also Morris v. United States*, 125 S. Ct. 1959, 161 L. Ed. 2d 769, 2005 WL 697344 (2005) (granting certiorari, vacating, and remanding for resentencing in light of *Booker* in case in which petition for certiorari argued that "statutory maximum" exception in defendant's plea agreement allowed review of defendant's *Booker* claim, notwithstanding plea agreement's waiver-of-appeal provisions).

Thus, I respectfully dissent.